The solution of the problem presented by the principal case depends upon the effect of the cancellation of an unrecorded deed, as a conveyance. In some jurisdictions the surrender or cancellation of an unrecorded deed with the intent to revest title in the grantor has such an effect.[19] However, the true theory of these decisions, as stated more recently, is the principle of estoppel;[20] the grantee, by voluntarily consenting to the destruction of the deed, is precluded from proving its contents by parol.[21] This doctrine is subject to certain limitations: the parties must be put in *statu quo*,[22] and the rights of third persons must not be prejudiced.[23] In North Carolina, title does not pass until the deed is recorded;[24] the deed itself passes to the grantee only an equitable title which is subject to creditors' claims[25] and this equity may be destroyed by the cancellation of the deed. These views, however, are opposed to the weight of authority, and seem unsound on theory since they permit the transfer of real property by parol agreements.[26] Moreover, the destruction of the deed seems at most a destruction of the evidence of title.[27] However, equitable considerations may arise rendering it unjust for the grantee to have the land. In such cases equity has refused affirmative aid to, and has even decreed positive relief against him. In the one case, a bill by the grantee to establish title was dismissed;[28] in the other, a parol agreement to reconvey, in pursuance of which the mutual surrender of the deed and the consideration took place, was specifically enforced, on the theory of part performance.[29] A Pennsylvania case has decided that the surrender to the grantor, and cancellation of a deed taken on a parol trust for the wife of the grantee, combined with a directed new conveyance to the wife, operates as an execution of the trust.[30] Although this view is sufficient to solve the problem of the principal case in favor of the *cestui*, such a result would seem unattainable under the prevailing view of the effect of the cancellation of an unrecorded deed.

STATUS OF THE MORTGAGEE UNDER HIS MORTGAGOR'S INSURANCE POLICY.—A mortgagor and mortgagee have separate and distinct insurable interests in the mortgaged premises which may be covered in one policy or in separate policies.[1] The mortgagor may insure the premises for their full value and may recover the whole amount, if, at the time of the loss, he has the right of redemption.[2] The mortgagee, however,

[19]Comw. *v.* Dudley (1813) 10 Mass. 411.
[20]Trull *v.* Skinner (Mass. 1835) 17 Pick. 213.
[21]Farrar *v.* Farrar (1827) 4 N. H. 191.
[22]Patterson *v.* Yeaton (1859) 47 Me. 308.
[23]Nason *v.* Grant (1842) 21 Me. 160.
[24]Austin *v.* King (1884) 91 N. C. 286.
[25]Davis *v.* Inscoe (1881) 84 N. C. 396.
[26]Devlin, Deeds § 305.
[27]Tate *v.* Clement *et al.* (1896) 176 Pa. St. 550.
[28]Sanford *et al. v.* Finkle (1884) 112 Ill. 146.
[29]Whisenant *v.* Gordon (1892) 101 Ala. 252.
[30]Barncord *v.* Kuhn (1860) 36 Pa. St. 383.

[1]Honore *v.* Lamar Fire Ins. Co. (1869) 51 Ill. 409, 414.
[2]Jones, Mortgages § 397; Carpenter *v.* Prov. Wash. Ins. Co. (1842) 16 Peters 495, 501.

may insure only to the extent of his debt[3] since his interest is not in the specific property but in its capacity to pay the debt.[4] Where one policy is taken out it becomes important, because of the differences in the attendant rights and liabilities, to determine whose interests have been insured. Some confusion among the authorities is attributable to a failure to distinguish between the three classes into which the cases may be conveniently grouped. If the policy is issued to the mortgagor with a "mortgage clause" added, both interests are insured, and the clause creates a new contract with the mortgagee and makes him a real party in interest, with separate rights distinct from those of the mortgagor.[5] By express provision the mortgagee's right to recover cannot be invalidated by any breach on the mortgagor's part, of the conditions contained in the policy.[6] If the policy is issued to the mortgagor, "loss, if any, payable to the mortgagee," by the great weight of authority the mortgagor is the insured, and the mortgagee is an assignee, with the assent of the insurer.[7] Since an ordinary assignee of a policy of insurance takes it subject to the conditions expressed upon its face, and may have his right defeated by the assignor breaching those conditions,[8] the same results logically follow in the case of the mortgagee to whom the loss is made payable. The mortgagee's rights as assignee are dependent on the existence of an insurable interest in the mortgagor at the time of the loss, the effect of the policy being, that, whenever any money shall become due to the mortgagor the insurer instead of paying him will pay the mortgagee. Therefore, if the mortgagor has parted with his interest before any loss is sustained, either by alienation of the property or by a breach of condition, the mortgagee cannot recover.[9] But since the mortgagee has a contract with the insurer to be paid according to the terms of the policy, the insurer and insured cannot effect a cancellation of the policy according to its terms, without the consent of the mortgagee.[10] After a loss has occurred the rights of the mortgagee become fixed[11] and, as is always the case in assignments with notice, the mortgagor and insurer can neither impair nor defeat the mortgagee's rights. The mortgagee, therefore, will not be bound by an appraisal and award to which he was not a party.[12] If there is an arbitration clause in the policy the mortgagee is, of course, bound to settle by that method because he takes his interest subject to the terms of the policy, but

[3]Kernochan *v.* N. Y. Bowery Ins. Co. (N. Y. 1855) 5 Duer 1.

[4]Smith *v.* Ins. Co. (1851) 17 Pa. St. 253, 260.

[5]Hastings *v.* Westchester Fire Ins. Co. (1878) 73 N. Y. 141.

[6]Hartford Fire Ins. Co. *v.* Olcott (1881) 97 Ill. 439, 450.

[7]Conn. Mutual Life Ins. Co. *v.* Scammon (1880) 4 Fed. 263, 274; Grosvenor *v.* Atlantic Fire Ins. Co. (1858) 17 N. Y. 391; *cf.* Martin *v.* Franklin Fire Ins. Co. (1875) 38 N. J. L. 140.

[8]Fogg *v.* Middlesex Mutual Fire Ins. Co. (Mass. 1852) 10 Cush. 337, 346; Ill. Mutual Fire Ins. Co. *v.* Fix (1870) 53 Ill. 151, 163.

[9]Grosvenor *v.* Atlantic Fire Ins. Co. *supra;* Hale *v.* Mechanics Mutual Fire Ins. Co. (Mass. 1856) 6 Gray 169.

[10]Lattan *v.* Royal Ins. Co. (1883) 45 N. J. L. 453.

[11]Browning *v.* Home Ins. Co. (1877) 71 N. Y. 508.

[12]Fire Assn. of London *v.* Blum (1885) 63 Tex. 282; Amer. Central Ins. Co. *v.* Sweetser (1888) 116 Ind. 370.

he must nevertheless be a party to any award before it will become binding on him.[13]

The third class of cases presents greater difficulties. Here the direction in the policy is, "loss, if any, payable to the mortgagee as his interests may appear." This is generally considered a mere appointment of the mortgagee as the payee, to the extent of his interest, of the insurance on the mortgagor's interest.[14] Since the mortgagee is only a payee it is clear that his rights may be defeated by acts of the mortgagor prior to the loss,[15] but the authorities split on the question of whether or not, after a loss has occurred, the mortgagee is bound by an appraisal and award, had between the insurer and insured, to which he is not a party. The difference in view may possibly be explained away by making a distinction between the case where there is no appraisal clause in the policy, and the case where such a clause does appear. In both cases, although it is true that the mortgagee has no vested interest as an assignee nor as the one who is insured, yet by virtue of his contract with the mortgagor he has an interest in the sense that he is entitled to have payment of his rightful share according to the terms of the contract between the insurer and insured. Therefore, where there is no appraisal clause this right cannot be defeated or diminished, without his consent, by any mode of settlement between the contracting parties not provided for in the contract.[16] On the other hand, where the policy does contain an appraisal clause, an appraisal and award is a condition precedent to any payment whatsoever. The mortgagee who has entered into no contractual relations with the insurer has no right as a stranger to participate in the adjustment of a loss, because such right is by the terms of the policy limited to the insurer and insured. Nor is the argument of participation for the sake of protection of any avail since the law cannot establish contract rights to protect a person who has failed to protect himself.[17]

In a recent case, *Erie Brewing Co.* v. *Ohio Farmers' Ins. Co.* (Oh. 1909) 89 N. E. 1065, a mortgagor had insured his premises, and the policy contained an appraisal clause and also a mortgage clause "loss payable to the mortgagee as his interests may appear, the insurance to this extent only, not to be invalidated by any breach of the conditions in the policy on the part of the mortgagor." A loss occurred and it was held that the mortgagee was bound by an appraisal and award had without his knowledge and consent, on the ground that the mortgagee was a mere appointee. The case is interesting from the point of view of the effect of the words "as his interest may appear" when contained in the "mortgage clause." If effect is given to the "mortgage clause," since it constitutes a separate contract of insurance on

[13]Bergman *v.* Comm. Union Assurance Co. (1892) 92 Ky. 494; Ins. Co. *v.* Stein (1895) 72 Miss. 943.

[14]Williamson *v.* Michigan F. & M. I. Co. (1893) 86 Wis. 393; Smith *v.* Union Ins. Co. (1876) 120 Mass. 90.

[15]Cont. Ins. Co. *v.* Hulman & Cox (1879) 92 Ill. 145; Brunswick Sav. Institution *v.* Comm. Ins. Co. (1878) 68 Me. 313.

[16]Hall *v.* Fire Assn. of Phila. (1887) 64 N. H. 405; Harrington *v.* Fitchburg Ins. Co. (1878) 124 Mass. 126; Hathaway *v.* Ohio Ins. Co. (1892) 134 N. Y. 409.

[17]Chandos *v.* Amer. Fire Ins. Co. of Phila. (1893) 84 Wis. 184; Collinsville Sav. Soc. *v.* Boston Ins. Co. (1905) 77 Conn. 676.

the mortgagee's interest, the mortgagee would only be bound by conditions in the policy which were also contained in the mortgage clause,[18] and would not be bound by an appraisal clause appearing only in the body of the policy.[19] The principal case, however, decides that the phrase "as his interests may appear" when contained in the "mortgage clause" operates to insure the mortgagor's interest and that therefore the legal consequences of an "appointment" follow, except in so far as they are avoided by the express provisions in the clause.

PRINCIPAL AND AGENT AS "PARTIES" IN *Res Adjudicata*.—Because of the two fundamental common law maxims that "each man is entitled to his day in court" and "no man shall be twice harassed for the same cause," the general rule is well established that judgments and decrees are conclusive evidence of facts between, and only between, parties to the litigation, and their privies.[1] While this general definition is almost universally accepted, there exists considerable uncertainty as to just what persons are comprised within the term "parties and their privies."[2] As used in this connection, it is now well settled that the word privies applies only to privies of estate;[3] and consequently under this part of the term only those who are interested in successive rights in particular property are affected by the rule.[4] The classes of persons most frequently embraced under the term as thus used are personal representatives, devisees, grantees and assignees;[5] and since their interests in the property must be acquired subsequent to the adjudication,[6] the reason for holding them bound thereby is apparent.

The word "parties" in the rule has, however, given the courts considerably more difficulty. Although a few cases have held that only parties to the record are to be considered parties bound by the judgment,[7] the courts have recognized the necessity of giving the term a broader meaning.[8] It was clear that when a suit was brought in the name of a nominal party, by the real party in interest, it was a distinct violation of the spirit of the rule that the real party should not be fully bound by the judicial determination of the litigation and so it was declared that the real parties to the suit were parties within the meaning of the rule;[9] and parol evidence could be introduced to ascertain such parties.[10] Often, too, although the suit had been brought by a real party, other persons who had a direct interest in the subject matter took upon themselves the position of parties by actively assist-

[18]Hartford Fire Ins. Co. *v.* Williams (1894) 63 Fed. 925.

[19]Hartford Fire Ins. Co. *v.* Olcott *supra*.

[1]Goundie *v.* Northampton Water Co. (1847) 7 Pa. St. 231; Hoppin *v.* Avery (1891) 87 Mich. 551.

[2]Hart *v.* Moulton (1899) 104 Wis. 349.

[3]McDonald & Co. *v.* Gregory (1875) 41 Ia. 513.

[4]Fogg *v.* Plumer (1845) 17 N. H. 112.

[5]State *ex rel. v.* St. Louis (1898) 140 Mo. 551.

[6]Minnesota Debenture Co. *v.* Johnson (1905) 94 Minn. 150.

[7]Allin's Heirs *v.* Hall's Heirs (Ky. 1819) 1 A. K. Marshall 391.

[8]Rogers *v.* Haines (Me. 1825) 3 Greenl. 362.

[9]Calhoun's Lessee *v.* Dunning (Pa. 1792) 4 Dallas 120.

[10]Tarleton *v.* Johnson (1854) 25 Ala. 300.